

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

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|------------------------------|---|--------------------------|
| UNITED STATES OF AMERICA |) | |
| |) | |
| v. |) | |
| |) | CRIMINAL NO. 1:10-CR-313 |
| JOSHUA BEHROUZ NABATKHORIAN, |) | |
| |) | |
| Defendant. |) | |

GOVERNMENT'S RESPONSE TO DEFENSE MOTION
TO DISMISS INDICTMENT

The United States of America, by and through its undersigned counsel, moves this Court to deny the defendant's motion to dismiss the Indictment.

LEGAL STANDARD

In *Hagner v. United States*, 285 U.S.427, 431 (1932), the Court held that:

"The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offence, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.

(Citations removed).

ARGUMENT

The Indictment in this case tracks the language of the statute and thus contains the elements of the charged offense. *See United States v. American Waste Fibers Co.*, 809 F.2d 1044, 1046 (4th Cir. 1987)(stating that "an indictment that merely tracks the statutory language is

ordinarily valid”). As a result, it alleges sufficient facts of a violation of Title 18, United States Code, Section 2422(b).

The defendant also claims that he is being charged with attempting to entice a grown-up and not a minor, thus violating his right to free speech. The facts of this case as presented in the government’s pleadings allege that in or about November 2009, the defendant sent dozens of text messages and emails to the phone and email account of an actual 13-year-old girl. It is alleged that the defendant knew this actual girl and knew that she was actually thirteen years old at that time. The facts also allege that the defendant was arrested mere blocks from the actual thirteen year-old’s residence where he had planned to meet the actual thirteen-year-old girl with the intention of taking her to a hotel and having sexual intercourse, and other sexual acts proscribed by law, with her. A 51-year-old man having sex with a 13-year-old girl does not constitute protected speech.

To the extent that the defendant believed that he was talking to a 13-year-old girl but was actually talking to an adult, his defense is based on factual impossibility. “Factual impossibility exists where the objective is proscribed by the criminal law but a factual circumstance unknown to the actor prevents him from bringing it about.” *United States v. Hamrick*, 43 F.3d 877, 885 (4th Cir. 1995). The Court of Appeals for the Fourth Circuit has held that “factual impossibility is traditionally not a defense to a charge of attempt, and we now join those circuits that have expressly held that it is not a defense to an attempt crime.” *Id.*

CONCLUSION

The defendant's motion to dismiss the Indictment should be denied. The Indictment properly recounts the elements of the crime. The defendant is accused of attempting to entice an actual thirteen-year-old girl. The Court of Appeals for the Fourth Circuit has held that factual impossibility is not a defense to an attempt crime.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of October, 2010, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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